

State of Hawaii  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Division of Forestry and Wildlife  
Honolulu, Hawaii 96813

May 13, 2010

Chairperson and Members  
Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

Land Board Members:

**SUBJECT: REQUEST FOR APPROVAL TO ENTER INTO A 2-YEAR CONTRACT WITH THE ZOOLOGICAL SOCIETY OF SAN DIEGO TO PROVIDE SERVICES TO OPERATE THE ENDANGERED BIRD CAPTIVE PROPAGATION FACILITY ON MAUI, THE MAUI BIRD CONSERVATION CENTER, AND TO PROVIDE EXPERT AVICULTURAL SERVICES TO CONDUCT RELATED FOREST BIRD PROPAGATION PROJECTS AT THE KEAUHOU BIRD CONSERVATION CENTER ON THE ISLAND OF HAWAII AND THROUGHOUT THE STATE.**

This Board Submittal approves continuing a contractual relationship for operation of the Captive Propagation Program with the Zoological Society of San Diego for an additional two years and authorizes the Chairperson to enter into a contract for these services, subject to the necessary procurement approvals.

**BACKGROUND:** In 1996, the Division approached the Board to obtain permission to outsource aspects of the State's Captive Propagation Program. This was viewed as advantageous as it enabled the hiring of expert personnel to operate the program who offered a better level of services at less cost as well as efficiencies in the day-to-day operation of the program. It also allowed DOFAW to focus its limited resources on management and restoration of habitat on the 800,000 acres of state lands that the Division manages, and on other essential recovery actions for endangered species. The US Fish and Wildlife Service, a key Partner in our endangered bird recovery efforts, had recently entered into a contract with The Peregrine Fund, Inc. (TPF) to operate a newly developed captive propagation facility on the island of Hawaii. This presented the opportunity to consolidate both facilities under one manager -- thus integrating captive propagation and reintroduction programs in Hawaii. The Board approved the privatization of the captive propagation program with TPF in March 1996, issued a 20-year lease on the State's facilities at Olinda, and began a series of contracts to operate the State's program that continued through Fiscal Year 2006.

In October of 1999, TPF notified the Department and the US Fish and Wildlife Service that they believed the next needed level of achievement in the program would be accomplished best by the

transition of TPF's operational role to another entity, and recommended the Zoological Society of San Diego (ZSSD). Key to the recommendation of ZSSD was an ongoing collaboration between these institutions that would facilitate a smooth transition without a change in the operational management staff. The Board took the following actions to address that transition.

#### PRIOR BOARD ACTIONS

1. August 27, 1999. The Board approved TPF FY00 Contract with provisions for an option to subcontract or assign the contract. The Board also asked the Department to address public concerns for more information and openness in the program.
2. December 10, 1999. The Board approved the assignment of TPF's FY00 contract obligations and liabilities to ZSSD. The Board also approved that the Department develop a transition plan for operation of the facilities that meets all federal and state procurement standards. The Department reported on the Partnership's commitment to provide more information to the public via outreach efforts, obtain input on Annual and Five-Year Workplans, provide for responsible data sharing, and the formation of a Veterinary Advisory Group.
3. June 9, 2000. The Division reported on the transition plan that included a letter of inquiry to 30 zoos. Only ZSSD responded that they were willing and able to run the program at that time. The Board authorized the Division to begin a sole source contract process for the ZSSD to operate the Maui facility for FY01 and FY02 and to transfer the lease from TPF to ZSSD.
4. November 17, 2000. The Board approved a 2-year contract with ZSSD to provide services to operate the endangered bird captive propagation facilities on Maui and the island of Hawaii and conduct related forest bird propagation projects throughout the State.
5. August 23, 2002. The Board approved a 2-year contract with ZSSD to provide services to operate the endangered bird captive propagation facilities on Maui and the island of Hawaii and conduct related forest bird propagation projects throughout the State. The purchase of these services was approved as an Exempt Purchase by the Chief Procurement Officer on 6/19/02 (Exempt Purchase Approval No. 02-55-J).
6. May 14, 2004. The Board approved a 2-year contract with ZSSD to provide services to operate the endangered bird captive propagation facilities on Maui and the island of Hawaii and conduct related forest bird propagation projects throughout the State. The purchase of these services was approved as an Exempt Purchase by the Chief Procurement Officer on 6/16/04 (Exempt Purchase Approval No. 02-55-J).
7. May 26, 2006. The Board approved a 2-year contract with ZSSD to provide services to operate the endangered bird captive propagation facilities on Maui and the island of Hawaii and conduct related forest bird propagation projects throughout the State.
8. June 23, 2006. The Board approved an amendment to the above contract that would provide additional funds to build a captive Maui Parrotbill flock. The purchase of these services was approved as an Exempt Purchase by the Chief Procurement Officer on 08/09/06 (Exempt Purchase Approval No. 07-009J).
9. June 13, 2008. The Board approved a 2-year contract with ZSSD to provide services to operate the endangered bird captive propagation facilities on Maui and the island of Hawaii and conduct related forest bird propagation projects throughout the State. The

purchase of these services was approved as an Exempt Purchase by the Chief Procurement Officer on 12/23/08 (Exempt Purchase Approval No. 09-036-C).

### CONTRACT PROVISIONS

The proposed contract will provide \$854,000 of federal funds (\$402,000 in FY11 and \$452,000 in FY12) to the Zoological Society of San Diego to provide services to operate the State-leased captive propagation facilities on Maui and to provide expert avicultural services to conduct related forest bird propagation projects at the Keauhou Bird Conservation Center, Volcano and throughout the State (Attachment A). This contract will be effective for the period July 1, 2010 to June 30, 2012. The \$854,000 is composed entirely of Federal funding provided to the state through a grant from the U.S. Fish and Wildlife Service. The Zoological Society of San Diego will provide up to \$284,000 of private funds or in-kind services to meet the State matching requirement for these Federal funds. Entering into the contract and continuing the contract for Year 2 (FY12) will be contingent on continued receipt of Federal grants and availability of Federal funds for this project.

The major activities planned for the program will be to continue to develop and implement successful captive propagation and reintroduction programs for 'Alalā, Puaiohi, Nēnē, Maui Parrotbill, Puaiohi and Palila, as outlined in the Five Year Workplan. The Zoological Society of San Diego will provide personnel, goods and services to operate and maintain the Maui facilities as an integrated program with the Hawai'i facilities; provide care and breeding of captive endangered birds; assist in collection and release of forest birds; administer the program; and provide annual progress and financial reports by November 15, 2011 and 2012. The scope of work implements the next two years of the jointly developed captive propagation work plan. The Five Year Work Plan is posted on the DLNR web site for public information. The plan will be revised and updated in late 2010 by the interagency captive propagation working group.

The purchase of these services from the Zoological Society of San Diego was approved as an Exempt Purchase by the Chief Procurement Officer on 4/12/2010 (Exempt Purchase Approval No. 10-57-D).

Upon approval by the Board, the Division will negotiate the terms and conditions of the contract based on the parameters discussed above, submit the contract for review and approval as to form by the Attorney General, and process the document for signature by the Chairperson.

### RECOMMENDATION:

That the Board authorize the Chairperson to negotiate and execute a Contract for Services for two years in the amount not to exceed \$854,000 with the Zoological Society of San Diego subject to:


1. The receipt of Federal grants and availability of Federal funds for the contract.
2. Reviewed approval by the Attorney General's Office and such other terms and conditions as may be prescribed by the Chairperson to best serve the interest of the State.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul J. Conry", written over a horizontal line.

PAUL J. CONRY, Administrator  
Division of Forestry and Wildlife

APPROVED FOR SUBMITTAL:

A handwritten signature in black ink, appearing to read "Laura H. Thielen", written over a horizontal line.

Laura H Thielen, Chairperson

DRAFT



**STATE OF HAWAII**  
**CONTRACT FOR GOODS AND SERVICES**  
(IN THE FOLLOWING CATEGORIES: EXEMPT; SMALL PURCHASE;  
SOLE SOURCE; OR EMERGENCY)

This Contract, executed on the respective dates indicated below, is effective as of \_\_\_\_\_, between Board of Land and Natural Resources,  
(Insert name of state department, agency, board or commission)  
State of Hawaii ("STATE"), by its Chairperson,  
(Insert title of person signing for State)  
(hereafter also referred to as the HEAD OF THE PURCHASING AGENCY or designee ("HOPA")), whose address is 1151 Punchbowl Street, Room 130, Honolulu, HI 96813  
and Zoological Society of San Diego, California  
("CONTRACTOR"), a Non-profit Corporation,  
(Insert corporation, partnership, joint venture, sole proprietorship, or other legal form of the Contractor)  
under the laws of the State of California, whose business address and federal and state taxpayer identification numbers are as follows: P.O. Box 120551, San Diego, California 92112-0551; FEIN # 95-164-8219; Hawaii General Excise # 30117317

**RECITALS**

A. The STATE is in need of the goods and services, or both, described in this Contract and its attachments. The CONTRACTOR is agreeable to providing the goods and services, or both, as the case may be.

B. This Contract is for (check one box):

☒ (1) A procurement expenditure of public funds for goods or services, or both, that is otherwise exempt from public bidding as set forth in section 103D-102, Hawaii Revised Statutes ("HRS"), and chapter 3-120, Hawaii Administrative Rules ("HAR"); or

☐ (2) A small purchase procurement of goods or services, or both, as set forth in section 103D-305, HRS, and subchapter 8, chapter 3-122, HAR; or

☐ (3) A sole source procurement of goods or services, or both, as set forth in section 103D-306, HRS, and subchapter 9, chapter 3-122, HAR; or

☐ (4) An emergency procurement of goods or services, or both, as set forth in section 103D-307, HRS, and subchapter 10, chapter 3-122, HAR.

C. Money is available to fund this Contract pursuant to:

(1) \_\_\_\_\_  
(Identify state sources)

or (2) U. S. Fish and Wildlife ESA Section 6 Program ( 16 U.S.C 1531-1543) (S-204)  
(Identify federal sources)

or both, in the following amounts: State \$ \_\_\_\_\_  
Federal \$ 854,000.00

D. Pursuant to HRS 171-6, the STATE  
(Legal authority to enter into this Contract)

is authorized to enter into this Contract.

E. The agency's Chief Procurement Officer is Arron Fujioka  
who ☒ has approved this procurement or ☐ is not required to approve this procurement.

NOW, THEREFORE, in consideration of the promises contained in this Contract, the STATE and the CONTRACTOR agree as follows:

I. Scope of Services. The CONTRACTOR shall, in a proper and satisfactory manner as determined by the STATE, provide all the goods or services, or both, set forth in Attachment-S1, which is made a part of this Contract.

2. Compensation. The CONTRACTOR shall be compensated for goods supplied or services performed, or both, under this Contract in a total amount not to exceed Eight Hundred Fifty Four Thousand DOLLARS (\$ 854,000.00 ), including approved costs incurred and taxes, according to the Compensation and Payment Schedule set forth in Attachment-S2, which is made a part of this Contract.

3. Time of Performance. The services or goods required of the CONTRACTOR under this Contract shall be performed and completed in accordance with the Time of Performance set forth in Attachment-S3, which is made a part of this Contract.

4. Bonds. The CONTRACTOR ☐ is required to provide or ☒ is not required to provide: ☐ a performance bond, ☐ a payment bond, ☐ a performance and payment bond in the amount of \_\_\_\_\_ DOLLARS (\$ \_\_\_\_\_ ).

5. Standards of Conduct Declaration. The Standards of Conduct Declaration of the CONTRACTOR is attached to and made a part of this Contract.

6. Other Terms and Conditions. The General Conditions and any Special Conditions are attached to and made a part of this Contract. In the event of a conflict between the General Conditions and the Special Conditions, the Special Conditions shall control.

7. Liquidated Damages. Liquidated damages shall be assessed in the amount of ( Not applicable ) DOLLARS (\$ \_\_\_\_\_ ) per day, in accordance with the terms of paragraph 9 of the General Conditions.

8. Notices. Any written notice required to be given by any party to this Contract shall be (a) delivered personally, or (b) sent by United States first class mail, postage prepaid. Notice to the STATE shall be sent to the HOPA'S address indicated in the Contract. Notice to the CONTRACTOR shall be sent to the CONTRACTOR'S address indicated in the Contract. A notice shall be deemed to have been received three (3) days after mailing or at the time of actual receipt, whichever is earlier. The CONTRACTOR is responsible for notifying the STATE in writing of any change of address.

IN VIEW OF THE ABOVE, the parties execute this Contract by their signatures, on the dates below, to be effective as of the date first above written.

#### STATE

\_\_\_\_\_  
(Signature)

Laura H. Thielen

\_\_\_\_\_  
(Print Name)

Chairperson, Department of Land and Natural Resources

\_\_\_\_\_  
(Print Title)

\_\_\_\_\_  
(Date)

#### CONTRACTOR

CORPORATE SEAL

(If available)

Zoological Society of San Diego

\_\_\_\_\_  
(Name of Contractor)

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Print Name)

\_\_\_\_\_  
(Print Title)

\_\_\_\_\_  
(Date)

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Deputy Attorney General

\* Evidence of authority of the CONTRACTOR'S representative to sign this Contract for the CONTRACTOR must be attached.



STATE OF HAWAII

CONTRACTOR'S ACKNOWLEDGMENT

STATE OF \_\_\_\_\_ )  
 ) SS.  
\_\_\_\_\_ COUNTY OF \_\_\_\_\_ )

On this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ before me appeared  
\_\_\_\_\_ and \_\_\_\_\_, to me  
known, to be the person(s) described in and, who, being by me duly sworn, did say that he/she/they is/are  
\_\_\_\_\_ and \_\_\_\_\_ of  
\_\_\_\_\_, the  
CONTRACTOR named in the foregoing instrument, and that he/she/they is/are authorized to sign said  
instrument on behalf of the CONTRACTOR, and acknowledges that he/she/they executed said  
instrument as the free act and deed of the CONTRACTOR.

(Notary Seal)

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Print Name)

Notary Public, State of \_\_\_\_\_ California

My commission expires: \_\_\_\_\_



## STATE OF HAWAII

**CERTIFICATE OF EXEMPTION  
FROM CIVIL SERVICE****1. By Heads of Departments Delegated by the Director of the Department of Human Resources Development ("DHRD").\***

Pursuant to a delegation of the authority by the Director of DHRD, I certify that the services to be provided under this Contract, and the person(s) providing the services under this Contract are exempt from the civil service, pursuant to § 76-16, Hawaii Revised Statutes (HRS).

(Signature)

Laura H. Thielen

(Print Name)

Chairperson DLNR

(Print Title)

(Date)

\* This part of the form may be used by all department heads and the heads of attached agencies to whom the Director of DHRD expressly has delegated authority to certify § 76-16, HRS, civil service exemptions. The specific paragraph(s) of § 76-16, HRS, upon which an exemption is based should be noted in the contract file. If an exemption is based on § 76-16(b)(15), the contract must meet the following conditions:

- (1) It involves the delivery of completed work or product by or during a specific time;
- (2) There is no employee-employer relationship; and
- (3) The authorized funding for the service is from other than the "A" or personal services cost element.

**NOTE:** Not all attached agencies have received a delegation under § 76-16(b)(15). If in doubt, attached agencies should check with the Director of DHRD prior to certifying an exemption under § 76-16(b)(15). Authority to certify exemptions under §§ 76-16(b)(2), and 76-16(b)(12), HRS, has not been delegated: only the Director of DHRD may certify §§ 76-16(b)(2), and 76-16(b)(12) exemptions.

**2. By the Director of DHRD, State of Hawaii.**

I certify that the services to be provided under this Contract, and the person(s) providing the services under this Contract are exempt from the civil service, pursuant to § 76-16, HRS.

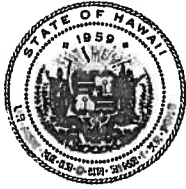
(Signature)

(Print Name)

(Print Title, if designee of the Director of DHRD)

(Date)





**STATE OF HAWAII**  
**CONTRACTOR'S**  
**STANDARDS OF CONDUCT DECLARATION**

For the purposes of this declaration:

"Agency" means and includes the State, the legislature and its committees, all executive departments, boards, commissions, committees, bureaus, offices; and all independent commissions and other establishments of the state government but excluding the courts.

"Controlling interest" means an interest in a business or other undertaking which is sufficient in fact to control, whether the interest is greater or less than fifty per cent (50%).

"Employee" means any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees, and employees under contract to the State or of the constitutional convention, but excluding legislators, delegates to the constitutional convention, justices, and judges. (Section 84-3, HRS).

On behalf of Zoological Society of San Diego, CONTRACTOR, the undersigned does declare as follows:

1. CONTRACTOR ☐ is ☒ is not a legislator or an employee or a business in which a legislator or an employee has a controlling interest. (Section 84-15(a), HRS).
2. CONTRACTOR has not been represented or assisted personally in the matter by an individual who has been an employee of the agency awarding this Contract within the preceding two years and who participated while so employed in the matter with which the Contract is directly concerned. (Section 84-15(b), HRS).
3. CONTRACTOR has not been assisted or represented by a legislator or employee for a fee or other compensation to obtain this Contract and will not be assisted or represented by a legislator or employee for a fee or other compensation in the performance of this Contract, if the legislator or employee had been involved in the development or award of the Contract. (Section 84-14 (d), HRS).
4. CONTRACTOR has not been represented on matters related to this Contract, for a fee or other consideration by an individual who, within the past twelve (12) months, has been an agency employee, or in the case of the Legislature, a legislator, and participated while an employee or legislator on matters related to this Contract. (Sections 84-18(b) and (c), HRS).

CONTRACTOR understands that the Contract to which this document is attached is voidable on behalf of the STATE if this Contract was entered into in violation of any provision of chapter 84, Hawaii Revised Statutes, commonly referred to as the Code of Ethics, including the provisions which are the source of the declarations above. Additionally, any fee, compensation, gift, or profit received by any person as a result of a violation of the Code of Ethics may be recovered by the STATE.

**CONTRACTOR**

By \_\_\_\_\_  
(Signature)

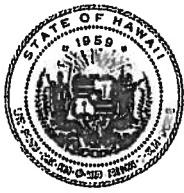
Print Name \_\_\_\_\_

Print Title Executive Director

Name of Contractor Zoological Society of San Diego

Date \_\_\_\_\_

\* Reminder to Agency: If the "is" block is checked and if the Contract involves goods or services of a value in excess of \$10,000, the Contract must be awarded by competitive sealed bidding under section 103D-302, HRS, or a competitive sealed proposal under section 103D-303, HRS. Otherwise, the Agency may not award the Contract unless it posts a notice of its intent to award it and files a copy of the notice with the State Ethics Commission. (Section 84-15(a), HRS).



## STATE OF HAWAII

# SCOPE OF SERVICES

1. **PROJECT:** Provide services to operate the Maui Bird Conservation Center (MBCC) captive propagation facility at Olinda, Maui and conduct related Hawaiian forest bird conservation and restoration projects at the Keauhou Bird Conservation Center (KBCC) and throughout the State.
2. **OBJECTIVES:** Provide expert avicultural services to care for and breed captive endangered bird species following recommendations and guidelines of Partnership Annual and Five-year Work plans. Species currently include: 'Alala, Nene, Maui Parrotbill, Palila, and Puaiohi. Upon continuing mutual agreement, participate in conservation actions designed to recover other Hawaiian bird species currently held in captivity or, by mutual agreement, species newly brought into captivity at KBCC or MBCC or in the field; develop avicultural techniques for the propagation and restoration of endangered Hawaiian forest birds; participate in collection and release efforts that have been agreed upon by the partners; and provide review to the partners on captive propagation and recovery actions pertaining to this program.
3. **SCOPE OF SERVICES:** To achieve the above objectives, the CONTRACTOR shall provide the following services:
  - a) In partnership with the Hawai'i Division of Forestry and Wildlife and the U.S. Fish and Wildlife Service, plan and implement activities to propagate endangered and other select species of Hawaiian birds at MBCC and KBCC as part of the State of Hawaii's Captive Propagation Program.
  - b) Provide adequate personnel, goods, and services to operate and maintain the Maui Bird Conservation Center at Olinda, Maui and the Keauhou Bird Conservation Center, in Volcano, Hawaii.
  - c) Provide daily care for the birds maintained at the MBCC and KBCC and determine basic husbandry requirements for each species including routine avicultural procedures, breeding season management, social and behavioral requirements, artificial incubation parameters, and hand-rearing protocols.
  - d) Monitor the health and well being of the birds being held at the MBCC and KBCC and provide routine and emergency veterinary care.
  - e) When necessary, develop avicultural techniques to breed common surrogate species; evaluate and apply these techniques to breeding the rarer and endangered Hawaiian forest birds.
  - f) Collect data on daily events, reproductive biology and performance, artificial incubation, chick hand-rearing and development, dietary requirements and nutritional habits, and bird behavior.
  - g) Maintain accurate and up-to-date records of the collection's history and the accomplishments of each program.
  - h) Participate in field recovery aspects of the captive propagation program including the release of birds reared in captivity, and as program needs require and as mutually agreed upon by all partners, the collection of eggs, nestlings, and adults.
  - i) Respond to partner agency requests for review on captive propagation and management issues that pertain to implementation of the State of Hawaii's Captive Propagation Program.
  - j) Participate on working groups and recovery teams as requested and as time permits.
  - k) Keep financial records in a manner that meets the reporting requirements for the federal aid funds provided by the State.



## STATE OF HAWAII

# SCOPE OF SERVICES

- l) Provide an annual progress and financial report for fiscal year 2011-12 on or before November 15, 2011 and for fiscal year 2012 on or before November 15, 2012.
- m) In partnership with the Division of Forestry and Wildlife and the U.S. Fish and Wildlife Service, jointly review and update the program's Five Year Workplan, incorporating input from advisory groups and the public.
- n) Establish, coordinate, and maintain a Veterinary Advisory Consortium consisting of ZSSD, State, Federal and facility veterinarians to provide veterinary care of the captive flock. The ZSSD Veterinary Consortium Coordinator and Program Director(s) will advise the Partnership on veterinary and disease issues.
- o) **TIME SCHEDULE:** The term of contract for providing services under this agreement shall be July 1, 2010 to June 30, 2012.
- p) **TIME EXTENSION:** Upon the written request and for good cause, an extension to the completion date of this agreement may be proposed by either Party and shall become effective upon written approval by the other party.



## STATE OF HAWAII

# COMPENSATION AND PAYMENT SCHEDULE

1. **SCOPE OF PAYMENT:** In full consideration of the services to be performed under this contract, the STATE agrees to pay the CONTRACTOR a total sum not to exceed EIGHT HUNDRED FIFTY FOUR THOUSAND NO/100 DOLLARS (\$854,000) according to the schedule outlined below that includes fiscal years 20011 and 2012. All funds shall be paid by the STATE to the CONTRACTOR, subject to appropriations, on an annual basis for the forthcoming fiscal year according to the schedule outlined below:

Fiscal Year 2011: \$ 402,000

Fiscal Year 2012: \$ 452,000

If in either fiscal year 2011 or 2012, the STATE does not appropriate, and/or the BOARD does not approve the expenditure of funds sufficient to meet the STATE's funding obligation under this AGREEMENT, this AGREEMENT shall automatically terminate without penalty at the end of the last fiscal year for which any funds have been appropriated.

2. **FISCAL YEAR PAYMENTS:** Subject to the availability of federal funds and the annual appropriation of funds, the State shall provide the following payments:

Fiscal Year 2011: \$ 402,000

Fiscal Year 2010: \$ 452,000

Total Payment: \$ 854,000

3. **PARTIAL PAYMENTS:** As work progresses and upon application by the CONTRACTOR, the State will make partial payments as requested based upon documented allowable reimbursable expenses.

4. **REIMBURSEMENT BASIS:** The total sum paid to the CONTRACTOR shall be based on a partial reimbursement basis of 75% of allowable costs up to \$402,000 in year 1 and \$452,000 in year 2. In order to receive full payment, the CONTRACTOR must document allowable charges totaling \$536,000 in year 1 and \$602,000 in year 2. The STATE will reimburse the CONTRACTOR for 75% of those costs up to a maximum of \$402,000 in year 1 and \$452,000 in year 2, subject to the provision for FINAL PAYMENT in item 5.

5. **FINAL PAYMENT:** \$2,000 of the total per fiscal year shall be withheld by the STATE until the CONTRACTOR successfully complies with all the terms and conditions of this agreement.

6. **INITIATING WORK:** All work completed by the CONTRACTOR prior to receipt of a fully-executed copy of this AGREEMENT, and prior to STATE and BOARD approval of funding for any subsequent years, shall be at the CONTRACTOR's own volition and risk, including work performed during the period of any deliberations by the BOARD or DEPARTMENT in anticipation of approval; provided, however, that if funding and/or amendments applicable to such work are subsequently approved, the CONTRACTOR may be paid for such work even if performed prior to such approval.



**STATE OF HAWAII**  
**TIME OF PERFORMANCE**

The time of performance for the specified contract with the Zoological Society of San Diego is July 1, 2010 to June 30, 2012.



## STATE OF HAWAII

# SPECIAL CONDITIONS

The following special provisions shall apply to this agreement:

1. **PUBLICITY:** It is expressly understood and agreed to by the STATE that General Condition No. 25 dealing with Publicity shall not be applicable to acknowledgment of the STATE's participation and funding of the project in any of the CONTRACTOR's reports, brochures, advertisements or other information released to the media or public nor shall it prohibit the CONTRACTOR from providing information on the STATE's activities associated with the Program. The CONTRACTOR shall refer all inquiries about STATE policy or administration of the Program to the CHAIRPERSON.

2. **RETENTION AND EXAMINATION OF RECORDS:** It is expressly understood and agreed to by the CONTRACTOR that the STATE or any of its duly authorized representatives shall have access to any pertinent books, documents, papers and records of the CONTRACTOR, whether written, printed, recorded, produced or reproduced by any mechanical, magnetic or other process or medium, in order to make audits, inspections, excerpts, transcripts or other examinations as authorized by law.

3. **NONDISCRIMINATION:** It is expressly understood and agreed to by the CONTRACTOR that it is subject to Title VI of the Civil Rights Act of 1964, Section 504 of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990, the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972; and offers all person the opportunity to participate in public programs regardless of race, color, national origin, age, sex or disability. The Contractor agrees that no individual will be turned away from, or otherwise denied access to, or benefit from any program it sponsors that is directly associated with a program of the contractor on the basis of race, color, national origin, age, sex or disability. A violation of this assurance may become reason to nullify this contract.

Financial records identified above shall be retained for a period of three years after submittal of the final financial report except that if any litigation, claim or audit is started before the expiration of the three-year period, the records shall be retained until all litigation, claims or findings have been resolved.

The CONTRACTOR is responsible for compliance with any applicable federal grant requirements as specified in Office of Management and Budget Circulars for non-profit organizations.

# GENERAL CONDITIONS

## Table of Contents

	<u>Page(s)</u>
1. Coordination of Services by the STATE.....	2
2. Relationship of Parties: Independent Contractor Status and Responsibilities, Including Tax Responsibilities .....	2
3. Personnel Requirements.....	3
4. Nondiscrimination.....	3
5. Conflicts of Interest.....	3
6. Subcontracts and Assignments.....	3
7. Indemnification and Defense .....	4
8. Cost of Litigation .....	4
9. Liquidated Damages.....	4
10. STATE'S Right of Offset .....	4
11. Disputes .....	4
12. Suspension of Contract .....	4
13. Termination for Default .....	5
14. Termination for Convenience.....	6
15. Claims Based on the Agency Procurement Officer's Actions or Omissions .....	7
16. Costs and Expenses.....	8
17. Payment Procedures; Final Payment; Tax Clearance .....	9
18. Federal Funds.....	9
19. Modifications of Contract .....	9
20. Change Order .....	10
21. Price Adjustment.....	11
22. Variation in Quantity for Definite Quantity Contracts .....	11
23. Changes in Cost-Reimbursement Contract.....	11
24. Confidentiality of Material .....	12
25. Publicity .....	12
26. Ownership Rights and Copyright.....	12
27. Liens and Warranties.....	12
28. Audit of Books and Records of the CONTRACTOR .....	12
29. Cost or Pricing Data.....	12
30. Audit of Cost or Pricing Data.....	13
31. Records Retention.....	13
32. Antitrust Claims .....	13
33. Patented Articles. ....	13
34. Governing Law .....	13
35. Compliance with Laws.....	13
36. Conflict between General Conditions and Procurement Rules.....	13
37. Entire Contract.....	13
38. Severability .....	13
39. Waiver.....	14
40. Pollution Control.....	14



## GENERAL CONDITIONS

1. Coordination of Services by the STATE. The head of the purchasing agency ("HOPA") (which term includes the designee of the HOPA) shall coordinate the services to be provided by the CONTRACTOR in order to complete the performance required in the Contract. The CONTRACTOR shall maintain communications with HOPA at all stages of the CONTRACTOR'S work, and submit to HOPA for resolution any questions which may arise as to the performance of this Contract. "Purchasing agency" as used in these General Conditions means and includes any governmental body which is authorized under chapter 103D, HRS, or its implementing rules and procedures, or by way of delegation, to enter into contracts for the procurement of goods or services or both.
2. Relationship of Parties: Independent Contractor Status and Responsibilities, Including Tax Responsibilities.
  - a. In the performance of services required under this Contract, the CONTRACTOR is an "independent contractor," with the authority and responsibility to control and direct the performance and details of the work and services required under this Contract; however, the STATE shall have a general right to inspect work in progress to determine whether, in the STATE'S opinion, the services are being performed by the CONTRACTOR in compliance with this Contract. Unless otherwise provided by special condition, it is understood that the STATE does not agree to use the CONTRACTOR exclusively, and that the CONTRACTOR is free to contract to provide services to other individuals or entities while under contract with the STATE.
  - b. The CONTRACTOR and the CONTRACTOR'S employees and agents are not by reason of this Contract, agents or employees of the State for any purpose, and the CONTRACTOR and the CONTRACTOR'S employees and agents shall not be entitled to claim or receive from the State any vacation, sick leave, retirement, workers' compensation, unemployment insurance, or other benefits provided to state employees.
  - c. The CONTRACTOR shall be responsible for the accuracy, completeness, and adequacy of the CONTRACTOR'S performance under this Contract. Furthermore, the CONTRACTOR intentionally, voluntarily, and knowingly assumes the sole and entire liability to the CONTRACTOR'S employees and agents, and to any individual not a party to this Contract, for all loss, damage, or injury caused by the CONTRACTOR, or the CONTRACTOR'S employees or agents in the course of their employment.
  - d. The CONTRACTOR shall be responsible for payment of all applicable federal, state, and county taxes and fees which may become due and owing by the CONTRACTOR by reason of this Contract, including but not limited to (i) income taxes, (ii) employment related fees, assessments, and taxes, and (iii) general excise taxes. The CONTRACTOR also is responsible for obtaining all licenses, permits, and certificates that may be required in order to perform this Contract.
  - e. The CONTRACTOR shall obtain a general excise tax license from the Department of Taxation, State of Hawaii, in accordance with section 237-9, HRS, and shall comply with all requirements thereof. The CONTRACTOR shall obtain a tax clearance certificate from the Director of Taxation, State of Hawaii, showing that all delinquent taxes, if any, levied or accrued under state law against the CONTRACTOR have been paid and submit the same to the STATE prior to commencing any performance under this Contract. The CONTRACTOR shall also be solely responsible for meeting all requirements necessary to obtain the tax clearance certificate required for final payment under sections 103-53 and 103D-328, HRS, and paragraph 17 of these General Conditions.
  - f. The CONTRACTOR is responsible for securing all employee-related insurance coverage for the CONTRACTOR and the CONTRACTOR'S employees and agents that is or may be required by law, and for payment of all premiums, costs, and other liabilities associated with securing the insurance coverage.

3. Personnel Requirements.
  - a. The CONTRACTOR shall secure, at the CONTRACTOR'S own expense, all personnel required to perform this Contract.
  - b. The CONTRACTOR shall ensure that the CONTRACTOR'S employees or agents are experienced and fully qualified to engage in the activities and perform the services required under this Contract, and that all applicable licensing and operating requirements imposed or required under federal, state, or county law, and all applicable accreditation and other standards of quality generally accepted in the field of the activities of such employees and agents are complied with and satisfied.
4. Nondiscrimination. No person performing work under this Contract, including any subcontractor, employee, or agent of the CONTRACTOR, shall engage in any discrimination that is prohibited by any applicable federal, state, or county law.
5. Conflicts of Interest. The CONTRACTOR represents that neither the CONTRACTOR, nor any employee or agent of the CONTRACTOR, presently has any interest, and promises that no such interest, direct or indirect, shall be acquired, that would or might conflict in any manner or degree with the CONTRACTOR'S performance under this Contract.
6. Subcontracts and Assignments. The CONTRACTOR shall not assign or subcontract any of the CONTRACTOR'S duties, obligations, or interests under this Contract and no such assignment or subcontract shall be effective unless (i) the CONTRACTOR obtains the prior written consent of the STATE and (ii) the CONTRACTOR'S assignee or subcontractor submits to the STATE a tax clearance certificate from the Director of Taxation, State of Hawaii, showing that all delinquent taxes, if any, levied or accrued under state law against the CONTRACTOR'S assignee or subcontractor have been paid. Additionally, no assignment by the CONTRACTOR of the CONTRACTOR'S right to compensation under this Contract shall be effective unless and until the assignment is approved by the Comptroller of the State of Hawaii, as provided in section 40-58, HRS.
  - a. Recognition of a successor in interest. When in the best interest of the State, a successor in interest may be recognized in an assignment contract in which the STATE, the CONTRACTOR and the assignee or transferee (hereinafter referred to as the "Assignee") agree that:
    - (1) The Assignee assumes all of the CONTRACTOR'S obligations;
    - (2) The CONTRACTOR remains liable for all obligations under this Contract but waives all rights under this Contract as against the STATE; and
    - (3) The CONTRACTOR shall continue to furnish, and the Assignee shall also furnish, all required bonds.
  - b. Change of name. When the CONTRACTOR asks to change the name in which it holds this Contract with the STATE, the procurement officer of the purchasing agency (hereinafter referred to as the "Agency procurement officer") shall, upon receipt of a document acceptable or satisfactory to the Agency procurement officer indicating such change of name (for example, an amendment to the CONTRACTOR'S articles of incorporation), enter into an amendment to this Contract with the CONTRACTOR to effect such a change of name. The amendment to this Contract changing the CONTRACTOR'S name shall specifically indicate that no other terms and conditions of this Contract are thereby changed.
  - c. Reports. All assignment contracts and amendments to this Contract effecting changes of the CONTRACTOR'S name or novations hereunder shall be reported to the chief procurement officer (CPO) as defined in section 103D-203(a), HRS, within thirty days of the date that the assignment contract or amendment becomes effective.
  - d. Actions affecting more than one purchasing agency. Notwithstanding the provisions of subparagraphs 6a through 6c herein, when the CONTRACTOR holds contracts with more than one purchasing

agency of the State, the assignment contracts and the novation and change of name amendments herein authorized shall be processed only through the CPO's office.

7. Indemnification and Defense. The CONTRACTOR shall defend, indemnify, and hold harmless the State of Hawaii, the contracting agency, and their officers, employees, and agents from and against all liability, loss, damage, cost, and expense, including all attorneys' fees, and all claims, suits, and demands therefore, arising out of or resulting from the acts or omissions of the CONTRACTOR or the CONTRACTOR'S employees, officers, agents, or subcontractors under this Contract. The provisions of this paragraph shall remain in full force and effect notwithstanding the expiration or early termination of this Contract.
8. Cost of Litigation. In case the STATE shall, without any fault on its part, be made a party to any litigation commenced by or against the CONTRACTOR in connection with this Contract, the CONTRACTOR shall pay all costs and expenses incurred by or imposed on the STATE, including attorneys' fees.
9. Liquidated Damages. When the CONTRACTOR is given notice of delay or nonperformance as specified in paragraph 13 (Termination for Default) and fails to cure in the time specified, it is agreed the CONTRACTOR shall pay to the STATE the amount, if any, set forth in this Contract per calendar day from the date set for cure until either (i) the STATE reasonably obtains similar goods or services, or both, if the CONTRACTOR is terminated for default, or (ii) until the CONTRACTOR provides the goods or services, or both, if the CONTRACTOR is not terminated for default. To the extent that the CONTRACTOR'S delay or nonperformance is excused under paragraph 13d (Excuse for Nonperformance or Delay Performance), liquidated damages shall not be assessable against the CONTRACTOR. The CONTRACTOR remains liable for damages caused other than by delay.
10. STATE'S Right of Offset. The STATE may offset against any monies or other obligations the STATE owes to the CONTRACTOR under this Contract, any amounts owed to the State of Hawaii by the CONTRACTOR under this Contract or any other contracts, or pursuant to any law or other obligation owed to the State of Hawaii by the CONTRACTOR, including, without limitation, the payment of any taxes or levies of any kind or nature. The STATE will notify the CONTRACTOR in writing of any offset and the nature of such offset. For purposes of this paragraph, amounts owed to the State of Hawaii shall not include debts or obligations which have been liquidated, agreed to by the CONTRACTOR, and are covered by an installment payment or other settlement plan approved by the State of Hawaii, provided, however, that the CONTRACTOR shall be entitled to such exclusion only to the extent that the CONTRACTOR is current with, and not delinquent on, any payments or obligations owed to the State of Hawaii under such payment or other settlement plan.
11. Disputes. Disputes shall be resolved in accordance with section 103D-703, HRS, and chapter 3-126, Hawaii Administrative Rules ("HAR"), as the same may be amended from time to time.
12. Suspension of Contract. The STATE reserves the right at any time and for any reason to suspend this Contract for any reasonable period, upon written notice to the CONTRACTOR in accordance with the provisions herein.
  - a. Order to stop performance. The Agency procurement officer may, by written order to the CONTRACTOR, at any time, and without notice to any surety, require the CONTRACTOR to stop all or any part of the performance called for by this Contract. This order shall be for a specified period not exceeding sixty (60) days after the order is delivered to the CONTRACTOR, unless the parties agree to any further period. Any such order shall be identified specifically as a stop performance order issued pursuant to this section. Stop performance orders shall include, as appropriate: (1) A clear description of the work to be suspended; (2) Instructions as to the issuance of further orders by the CONTRACTOR for material or services; (3) Guidance as to action to be taken on subcontracts; and (4) Other instructions and suggestions to the CONTRACTOR for minimizing costs. Upon receipt of such an order, the CONTRACTOR shall forthwith comply with its terms and suspend all performance under this Contract at the time stated, provided, however, the CONTRACTOR shall take all reasonable steps to minimize the occurrence of costs allocable to the performance covered by the order during the period of performance stoppage. Before the stop performance order expires, or within any further period to which the parties shall have agreed, the Agency procurement officer shall either:
    - (i) Cancel the stop performance order; or

- (2) Terminate the performance covered by such order as provided in the termination for default provision or the termination for convenience provision of this Contract.
- b. Cancellation or expiration of the order. If a stop performance order issued under this section is cancelled at any time during the period specified in the order, or if the period of the order or any extension thereof expires, the CONTRACTOR shall have the right to resume performance. An appropriate adjustment shall be made in the delivery schedule or contract price, or both, and the Contract shall be modified in writing accordingly, if:
  - (1) The stop performance order results in an increase in the time required for, or in the CONTRACTOR'S cost properly allocable to, the performance of any part of this Contract; and
  - (2) The CONTRACTOR asserts a claim for such an adjustment within thirty (30) days after the end of the period of performance stoppage; provided that, if the Agency procurement officer decides that the facts justify such action, any such claim asserted may be received and acted upon at any time prior to final payment under this Contract.
- c. Termination of stopped performance. If a stop performance order is not cancelled and the performance covered by such order is terminated for default or convenience, the reasonable costs resulting from the stop performance order shall be allowable by adjustment or otherwise.
- d. Adjustment of price. Any adjustment in contract price made pursuant to this paragraph shall be determined in accordance with the price adjustment provision of this Contract.

13. Termination for Default.

- a. Default. If the CONTRACTOR refuses or fails to perform any of the provisions of this Contract with such diligence as will ensure its completion within the time specified in this Contract, or any extension thereof, otherwise fails to timely satisfy the Contract provisions, or commits any other substantial breach of this Contract, the Agency procurement officer may notify the CONTRACTOR in writing of the delay or non-performance and if not cured in ten (10) days or any longer time specified in writing by the Agency procurement officer, such officer may terminate the CONTRACTOR'S right to proceed with the Contract or such part of the Contract as to which there has been delay or a failure to properly perform. In the event of termination in whole or in part, the Agency procurement officer may procure similar goods or services in a manner and upon the terms deemed appropriate by the Agency procurement officer. The CONTRACTOR shall continue performance of the Contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services.
- b. CONTRACTOR'S duties. Notwithstanding termination of the Contract and subject to any directions from the Agency procurement officer, the CONTRACTOR shall take timely, reasonable, and necessary action to protect and preserve property in the possession of the CONTRACTOR in which the STATE has an interest.
- c. Compensation. Payment for completed goods and services delivered and accepted by the STATE shall be at the price set forth in the Contract. Payment for the protection and preservation of property shall be in an amount agreed upon by the CONTRACTOR and the Agency procurement officer. If the parties fail to agree, the Agency procurement officer shall set an amount subject to the CONTRACTOR'S rights under chapter 3-126, HAR. The STATE may withhold from amounts due the CONTRACTOR such sums as the Agency procurement officer deems to be necessary to protect the STATE against loss because of outstanding liens or claims and to reimburse the STATE for the excess costs expected to be incurred by the STATE in procuring similar goods and services.
- d. Excuse for nonperformance or delayed performance. The CONTRACTOR shall not be in default by reason of any failure in performance of this Contract in accordance with its terms, including any failure by the CONTRACTOR to make progress in the prosecution of the performance hereunder which endangers such performance, if the CONTRACTOR has notified the Agency procurement

officer within fifteen (15) days after the cause of the delay and the failure arises out of causes such as: acts of God; acts of a public enemy; acts of the State and any other governmental body in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather. If the failure to perform is caused by the failure of a subcontractor to perform or to make progress, and if such failure arises out of causes similar to those set forth above, the CONTRACTOR shall not be deemed to be in default, unless the goods and services to be furnished by the subcontractor were reasonably obtainable from other sources in sufficient time to permit the CONTRACTOR to meet the requirements of the Contract. Upon request of the CONTRACTOR, the Agency procurement officer shall ascertain the facts and extent of such failure, and, if such officer determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, the CONTRACTOR'S progress and performance would have met the terms of the Contract, the delivery schedule shall be revised accordingly, subject to the rights of the STATE under this Contract. As used in this paragraph, the term "subcontractor" means subcontractor at any tier.

- e. Erroneous termination for default. If, after notice of termination of the CONTRACTOR'S right to proceed under this paragraph, it is determined for any reason that the CONTRACTOR was not in default under this paragraph, or that the delay was excusable under the provisions of subparagraph 13d, "Excuse for nonperformance or delayed performance," the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to paragraph 14.
- f. Additional rights and remedies. The rights and remedies provided in this paragraph are in addition to any other rights and remedies provided by law or under this Contract.

14. Termination for Convenience.

- a. Termination. The Agency procurement officer may, when the interests of the STATE so require, terminate this Contract in whole or in part, for the convenience of the STATE. The Agency procurement officer shall give written notice of the termination to the CONTRACTOR specifying the part of the Contract terminated and when termination becomes effective.
- b. CONTRACTOR'S obligations. The CONTRACTOR shall incur no further obligations in connection with the terminated performance and on the date(s) set in the notice of termination the CONTRACTOR will stop performance to the extent specified. The CONTRACTOR shall also terminate outstanding orders and subcontracts as they relate to the terminated performance. The CONTRACTOR shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated performance subject to the STATE'S approval. The Agency procurement officer may direct the CONTRACTOR to assign the CONTRACTOR'S right, title, and interest under terminated orders or subcontracts to the STATE. The CONTRACTOR must still complete the performance not terminated by the notice of termination and may incur obligations as necessary to do so.
- c. Right to goods and work product. The Agency procurement officer may require the CONTRACTOR to transfer title and deliver to the STATE in the manner and to the extent directed by the Agency procurement officer:
  - (1) Any completed goods or work product; and
  - (2) The partially completed goods and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing material") as the CONTRACTOR has specifically produced or specially acquired for the performance of the terminated part of this Contract.

The CONTRACTOR shall, upon direction of the Agency procurement officer, protect and preserve property in the possession of the CONTRACTOR in which the STATE has an interest. If the Agency procurement officer does not exercise this right, the CONTRACTOR shall use best efforts to sell such goods and manufacturing materials. Use of this paragraph in no way implies that the STATE has breached the Contract by exercise of the termination for convenience provision.

d. Compensation.

- (1) The CONTRACTOR shall submit a termination claim specifying the amounts due because of the termination for convenience together with the cost or pricing data, submitted to the extent required by chapter 3-122, HAR, bearing on such claim. If the CONTRACTOR fails to file a termination claim within one year from the effective date of termination, the Agency procurement officer may pay the CONTRACTOR, if at all, an amount set in accordance with subparagraph 14d(3) below.
- (2) The Agency procurement officer and the CONTRACTOR may agree to a settlement provided the CONTRACTOR has filed a termination claim supported by cost or pricing data submitted as required and that the settlement does not exceed the total Contract price plus settlement costs reduced by payments previously made by the STATE, the proceeds of any sales of goods and manufacturing materials under subparagraph 14c, and the Contract price of the performance not terminated.
- (3) Absent complete agreement under subparagraph 14d(2) the Agency procurement officer shall pay the CONTRACTOR the following amounts, provided payments agreed to under subparagraph 14d(2) shall not duplicate payments under this subparagraph for the following:
  - (A) Contract prices for goods or services accepted under the Contract;
  - (B) Costs incurred in preparing to perform and performing the terminated portion of the performance plus a fair and reasonable profit on such portion of the performance, such profit shall not include anticipatory profit or consequential damages, less amounts paid or to be paid for accepted goods or services; provided, however, that if it appears that the CONTRACTOR would have sustained a loss if the entire Contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss;
  - (C) Costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to subparagraph 14b. These costs must not include costs paid in accordance with subparagraph 14d(3)(B);
  - (D) The reasonable settlement costs of the CONTRACTOR, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the Contract and for the termination of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to the terminated portion of this Contract. The total sum to be paid the CONTRACTOR under this subparagraph shall not exceed the total Contract price plus the reasonable settlement costs of the CONTRACTOR reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under subparagraph 14d(2), and the contract price of performance not terminated.
- (4) Costs claimed, agreed to, or established under subparagraphs 14d(2) and 14d(3) shall be in accordance with Chapter 3-123 (Cost Principles) of the Procurement Rules.

15. Claims Based on the Agency Procurement Officer's Actions or Omissions.

- a. Changes in scope. If any action or omission on the part of the Agency procurement officer (which term includes the designee of such officer for purposes of this paragraph 15) requiring performance changes within the scope of the Contract constitutes the basis for a claim by the CONTRACTOR for additional compensation, damages, or an extension of time for completion, the CONTRACTOR shall continue with performance of the Contract in compliance with the directions or orders of such

officials, but by so doing, the CONTRACTOR shall not be deemed to have prejudiced any claim for additional compensation, damages, or an extension of time for completion; provided:

- (1) Written notice required. The CONTRACTOR shall give written notice to the Agency procurement officer:
    - (A) Prior to the commencement of the performance involved, if at that time the CONTRACTOR knows of the occurrence of such action or omission;
    - (B) Within thirty (30) days after the CONTRACTOR knows of the occurrence of such action or omission, if the CONTRACTOR did not have such knowledge prior to the commencement of the performance; or
    - (C) Within such further time as may be allowed by the Agency procurement officer in writing.
  - (2) Notice content. This notice shall state that the CONTRACTOR regards the act or omission as a reason which may entitle the CONTRACTOR to additional compensation, damages, or an extension of time. The Agency procurement officer, upon receipt of such notice, may rescind such action, remedy such omission, or take such other steps as may be deemed advisable in the discretion of the Agency procurement officer;
  - (3) Basis must be explained. The notice required by subparagraph 15a(1) describes as clearly as practicable at the time the reasons why the CONTRACTOR believes that additional compensation, damages, or an extension of time may be remedies to which the CONTRACTOR is entitled; and
  - (4) Claim must be justified. The CONTRACTOR must maintain and, upon request, make available to the Agency procurement officer within a reasonable time, detailed records to the extent practicable, and other documentation and evidence satisfactory to the STATE, justifying the claimed additional costs or an extension of time in connection with such changes.
- b. CONTRACTOR not excused. Nothing herein contained, however, shall excuse the CONTRACTOR from compliance with any rules or laws precluding any state officers and CONTRACTOR from acting in collusion or bad faith in issuing or performing change orders which are clearly not within the scope of the Contract.
  - c. Price adjustment. Any adjustment in the price made pursuant to this paragraph shall be determined in accordance with the price adjustment provision of this Contract.

16. Costs and Expenses. Any reimbursement due the CONTRACTOR for per diem and transportation expenses under this Contract shall be subject to chapter 3-123 (Cost Principles), HAR, and the following guidelines:
- a. Reimbursement for air transportation shall be for actual cost or coach class air fare, whichever is less.
  - b. Reimbursement for ground transportation costs shall not exceed the actual cost of renting an intermediate-sized vehicle.
  - c. Unless prior written approval of the HOPA is obtained, reimbursement for subsistence allowance (i.e., hotel and meals, etc.) shall not exceed the applicable daily authorized rates for inter-island or out-of-state travel that are set forth in the current Governor's Executive Order authorizing adjustments in salaries and benefits for state officers and employees in the executive branch who are excluded from collective bargaining coverage.

17. Payment Procedures; Final Payment; Tax Clearance.
- a. Original invoices required. All payments under this Contract shall be made only upon submission by the CONTRACTOR of original invoices specifying the amount due and certifying that services requested under the Contract have been performed by the CONTRACTOR according to the Contract.
  - b. Subject to available funds. Such payments are subject to availability of funds and allotment by the Director of Finance in accordance with chapter 37, HRS. Further, all payments shall be made in accordance with and subject to chapter 40, HRS.
  - c. Prompt payment.
    - (1) Any money, other than retainage, paid to the CONTRACTOR shall be disbursed to subcontractors within ten (10) days after receipt of the money in accordance with the terms of the subcontract; provided that the subcontractor has met all the terms and conditions of the subcontract and there are no bona fide disputes; and
    - (2) Upon final payment to the CONTRACTOR, full payment to the subcontractor, including retainage, shall be made within ten (10) days after receipt of the money; provided that there are no bona fide disputes over the subcontractor's performance under the subcontract.
  - d. Final payment. Final payment under this Contract shall be subject to sections 103-53 and 103D-328, HRS, which require a tax clearance from the Director of Taxation, State of Hawaii, showing that all delinquent taxes, if any, levied or accrued under state law against the CONTRACTOR have been paid.
18. Federal Funds. If this Contract is payable in whole or in part from federal funds, CONTRACTOR agrees that, as to the portion of the compensation under this Contract to be payable from federal funds, the CONTRACTOR shall be paid only from such funds received from the federal government, and shall not be paid from any other funds. Failure of the STATE to receive anticipated federal funds shall not be considered a breach by the STATE or an excuse for nonperformance by the CONTRACTOR.
19. Modifications of Contract.
- a. In writing. Any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract permitted by this Contract shall be made by written amendment to this Contract, signed by the CONTRACTOR and the STATE, provided that change orders shall be made in accordance with paragraph 20 herein.
  - b. No oral modification. No oral modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract shall be permitted.
  - c. Agency procurement officer. By written order, at any time, and without notice to any surety, the Agency procurement officer may unilaterally order of the CONTRACTOR:
    - (A) Changes in the work within the scope of the Contract; and
    - (B) Changes in the time of performance of the Contract that do not alter the scope of the Contract work.
  - d. Adjustments of price or time for performance. If any modification increases or decreases the CONTRACTOR'S cost of, or the time required for, performance of any part of the work under this Contract, an adjustment shall be made and this Contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined, where applicable, in accordance with the price adjustment clause of this Contract or as negotiated.



- e. Claim barred after final payment. No claim by the CONTRACTOR for an adjustment hereunder shall be allowed if written modification of the Contract is not made prior to final payment under this Contract.
  - f. Claims not barred. In the absence of a written contract modification, nothing in this clause shall be deemed to restrict the CONTRACTOR'S right to pursue a claim under this Contract or for a breach of contract.
  - g. CPO approval. If this is a professional services contract awarded pursuant to section 103D-303 or 103D-304, HRS, any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract which increases the amount payable to the CONTRACTOR by at least \$25,000.00 or ten per cent (10%) of the initial contract price, whichever increase is higher, must receive the prior approval of the CPO.
  - h. Tax clearance. The STATE may, at its discretion, require the CONTRACTOR to submit to the STATE, prior to the STATE'S approval of any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract, a tax clearance from the Director of Taxation, State of Hawaii, showing that all delinquent taxes, if any, levied or accrued under state law against the CONTRACTOR have been paid.
  - i. Sole source contracts. Amendments to sole source contracts that would change the original scope of the Contract may only be made with the approval of the CPO. Annual renewal of a sole source contract for services should not be submitted as an amendment.
20. Change Order. The Agency procurement officer may, by a written order signed only by the STATE, at any time, and without notice to any surety, and subject to all appropriate adjustments, make changes within the general scope of this Contract in any one or more of the following:
- (1) Drawings, designs, or specifications, if the goods or services to be furnished are to be specially provided to the STATE in accordance therewith;
  - (2) Method of delivery; or
  - (3) Place of delivery.
- a. Adjustments of price or time for performance. If any change order increases or decreases the CONTRACTOR'S cost of, or the time required for, performance of any part of the work under this Contract, whether or not changed by the order, an adjustment shall be made and the Contract modified in writing accordingly. Any adjustment in the Contract price made pursuant to this provision shall be determined in accordance with the price adjustment provision of this Contract. Failure of the parties to agree to an adjustment shall not excuse the CONTRACTOR from proceeding with the Contract as changed, provided that the Agency procurement officer promptly and duly makes the provisional adjustments in payment or time for performance as may be reasonable. By proceeding with the work, the CONTRACTOR shall not be deemed to have prejudiced any claim for additional compensation, or any extension of time for completion.
  - b. Time period for claim. Within ten (10) days after receipt of a written change order under subparagraph 20a, unless the period is extended by the Agency procurement officer in writing, the CONTRACTOR shall respond with a claim for an adjustment. The requirement for a timely written response by CONTRACTOR cannot be waived and shall be a condition precedent to the assertion of a claim.
  - c. Claim barred after final payment. No claim by the CONTRACTOR for an adjustment hereunder shall be allowed if a written response is not given prior to final payment under this Contract.

- d. Other claims not barred. In the absence of a change order, nothing in this paragraph 20 shall be deemed to restrict the CONTRACTOR'S right to pursue a claim under the Contract or for breach of contract.

21. Price Adjustment.

- a. Price adjustment. Any adjustment in the contract price pursuant to a provision in this Contract shall be made in one or more of the following ways:
- (1) By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
  - (2) By unit prices specified in the Contract or subsequently agreed upon;
  - (3) By the costs attributable to the event or situation covered by the provision, plus appropriate profit or fee, all as specified in the Contract or subsequently agreed upon;
  - (4) In such other manner as the parties may mutually agree; or
  - (5) In the absence of agreement between the parties, by a unilateral determination by the Agency procurement officer of the costs attributable to the event or situation covered by the provision, plus appropriate profit or fee, all as computed by the Agency procurement officer in accordance with generally accepted accounting principles and applicable sections of chapters 3-123 and 3-126, HAR.
- b. Submission of cost or pricing data. The CONTRACTOR shall provide cost or pricing data for any price adjustments subject to the provisions of chapter 3-122, HAR.

22. Variation in Quantity for Definite Quantity Contracts. Upon the agreement of the STATE and the CONTRACTOR, the quantity of goods or services, or both, if a definite quantity is specified in this Contract, may be increased by a maximum of ten per cent (10%); provided the unit prices will remain the same except for any price adjustments otherwise applicable; and the Agency procurement officer makes a written determination that such an increase will either be more economical than awarding another contract or that it would not be practical to award another contract.

23. Changes in Cost-Reimbursement Contract. If this Contract is a cost-reimbursement contract, the following provisions shall apply:

- a. The Agency procurement officer may at any time by written order, and without notice to the sureties, if any, make changes within the general scope of the Contract in any one or more of the following:
- (1) Description of performance (Attachment 1);
  - (2) Time of performance (i.e., hours of the day, days of the week, etc.);
  - (3) Place of performance of services;
  - (4) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the STATE in accordance with the drawings, designs, or specifications;
  - (5) Method of shipment or packing of supplies; or
  - (6) Place of delivery.
- b. If any change causes an increase or decrease in the estimated cost of, or the time required for performance of, any part of the performance under this Contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this Contract, the Agency procurement officer

shall make an equitable adjustment in the (1) estimated cost, delivery or completion schedule, or both; (2) amount of any fixed fee; and (3) other affected terms and shall modify the Contract accordingly.

- c. The CONTRACTOR must assert the CONTRACTOR'S rights to an adjustment under this provision within thirty (30) days from the day of receipt of the written order. However, if the Agency procurement officer decides that the facts justify it, the Agency procurement officer may receive and act upon a proposal submitted before final payment under the Contract.
- d. Failure to agree to any adjustment shall be a dispute under paragraph 11 of this Contract. However, nothing in this provision shall excuse the CONTRACTOR from proceeding with the Contract as changed.
- e. Notwithstanding the terms and conditions of subparagraphs 23a and 23b, the estimated cost of this Contract and, if this Contract is incrementally funded, the funds allotted for the performance of this Contract, shall not be increased or considered to be increased except by specific written modification of the Contract indicating the new contract estimated cost and, if this contract is incrementally funded, the new amount allotted to the contract.

24. Confidentiality of Material.

- a. All material given to or made available to the CONTRACTOR by virtue of this Contract, which is identified as proprietary or confidential information, will be safeguarded by the CONTRACTOR and shall not be disclosed to any individual or organization without the prior written approval of the STATE.
- b. All information, data, or other material provided by the CONTRACTOR to the STATE shall be subject to the Uniform Information Practices Act, chapter 92F, HRS.

25. Publicity. The CONTRACTOR shall not refer to the STATE, or any office, agency, or officer thereof, or any state employee, including the HOPA, the CPO, the Agency procurement officer, or to the services or goods, or both, provided under this Contract, in any of the CONTRACTOR'S brochures, advertisements, or other publicity of the CONTRACTOR. All media contacts with the CONTRACTOR about the subject matter of this Contract shall be referred to the Agency procurement officer.

26. Ownership Rights and Copyright. The STATE shall have complete ownership of all material, both finished and unfinished, which is developed, prepared, assembled, or conceived by the CONTRACTOR pursuant to this Contract, and all such material shall be considered "works made for hire." All such material shall be delivered to the STATE upon expiration or termination of this Contract. The STATE, in its sole discretion, shall have the exclusive right to copyright any product, concept, or material developed, prepared, assembled, or conceived by the CONTRACTOR pursuant to this Contract.

27. Liens and Warranties. Goods provided under this Contract shall be provided free of all liens and provided together with all applicable warranties, or with the warranties described in the Contract documents, whichever are greater.

28. Audit of Books and Records of the CONTRACTOR. The STATE may, at reasonable times and places, audit the books and records of the CONTRACTOR, prospective contractor, subcontractor, or prospective subcontractor which are related to:

- a. The cost or pricing data, and
- b. A state contract, including subcontracts, other than a firm fixed-price contract.

29. Cost or Pricing Data. Cost or pricing data must be submitted to the Agency procurement officer and timely certified as accurate for contracts over \$100,000 unless the contract is for a multiple-term or as otherwise specified by the Agency procurement officer. Unless otherwise required by the Agency procurement officer, cost or pricing data submission is not required for contracts awarded pursuant to competitive sealed bid procedures.

If certified cost or pricing data are subsequently found to have been inaccurate, incomplete, or noncurrent as of the date stated in the certificate, the STATE is entitled to an adjustment of the contract price, including profit or fee, to exclude any significant sum by which the price, including profit or fee, was increased because of the defective data. It is presumed that overstated cost or pricing data increased the contract price in the amount of the defect plus related overhead and profit or fee. Therefore, unless there is a clear indication that the defective data was not used or relied upon, the price will be reduced in such amount.

30. Audit of Cost or Pricing Data. When cost or pricing principles are applicable, the STATE may require an audit of cost or pricing data.
31. Records Retention. The CONTRACTOR and any subcontractors shall maintain the books and records that relate to the Contract and any cost or pricing data for three (3) years from the date of final payment under the Contract.
32. Antitrust Claims. The STATE and the CONTRACTOR recognize that in actual economic practice, overcharges resulting from antitrust violations are in fact usually borne by the purchaser. Therefore, the CONTRACTOR hereby assigns to STATE any and all claims for overcharges as to goods and materials purchased in connection with this Contract, except as to overcharges which result from violations commencing after the price is established under this Contract and which are not passed on to the STATE under an escalation clause.
33. Patented Articles. The CONTRACTOR shall defend, indemnify, and hold harmless the STATE, and its officers, employees, and agents from and against all liability, loss, damage, cost, and expense, including all attorneys fees, and all claims, suits, and demands arising out of or resulting from any claims, demands, or actions by the patent holder for infringement or other improper or unauthorized use of any patented article, patented process, or patented appliance in connection with this Contract. The CONTRACTOR shall be solely responsible for correcting or curing to the satisfaction of the STATE any such infringement or improper or unauthorized use, including, without limitation: (a) furnishing at no cost to the STATE a substitute article, process, or appliance acceptable to the STATE, (b) paying royalties or other required payments to the patent holder, (c) obtaining proper authorizations or releases from the patent holder, and (d) furnishing such security to or making such arrangements with the patent holder as may be necessary to correct or cure any such infringement or improper or unauthorized use.
34. Governing Law. The validity of this Contract and any of its terms or provisions, as well as the rights and duties of the parties to this Contract, shall be governed by the laws of the State of Hawaii. Any action at law or in equity to enforce or interpret the provisions of this Contract shall be brought in a state court of competent jurisdiction in Honolulu, Hawaii.
35. Compliance with Laws. The CONTRACTOR shall comply with all federal, state, and county laws, ordinances, codes, rules, and regulations, as the same may be amended from time to time, that in any way affect the CONTRACTOR'S performance of this Contract.
36. Conflict Between General Conditions and Procurement Rules. In the event of a conflict between the General Conditions and the procurement rules, the procurement rules in effect on the date this Contract became effective shall control and are hereby incorporated by reference.
37. Entire Contract. This Contract sets forth all of the agreements, conditions, understandings, promises, warranties, and representations between the STATE and the CONTRACTOR relative to this Contract. This Contract supersedes all prior agreements, conditions, understandings, promises, warranties, and representations, which shall have no further force or effect. There are no agreements, conditions, understandings, promises, warranties, or representations, oral or written, express or implied, between the STATE and the CONTRACTOR other than as set forth or as referred to herein.
38. Severability. In the event that any provision of this Contract is declared invalid or unenforceable by a court, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining terms of this Contract.

39. Waiver. The failure of the STATE to insist upon the strict compliance with any term, provision, or condition of this Contract shall not constitute or be deemed to constitute a waiver or relinquishment of the STATE'S right to enforce the same in accordance with this Contract. The fact that the STATE specifically refers to one provision of the procurement rules or one section of the Hawaii Revised Statutes, and does not include other provisions or statutory sections in this Contract shall not constitute a waiver or relinquishment of the STATE'S rights or the CONTRACTOR'S obligations under the procurement rules or statutes.
40. Pollution Control. If during the performance of this Contract, the CONTRACTOR encounters a "release" or a "threatened release" of a reportable quantity of a "hazardous substance," "pollutant," or "contaminant" as those terms are defined in section 128D-1, HRS, the CONTRACTOR shall immediately notify the STATE and all other appropriate state, county, or federal agencies as required by law. The Contractor shall take all necessary actions, including stopping work, to avoid causing, contributing to, or making worse a release of a hazardous substance, pollutant, or contaminant, and shall promptly obey any orders the Environmental Protection Agency or the state Department of Health issues in response to the release. In the event there is an ensuing cease-work period, and the STATE determines that this Contract requires an adjustment of the time for performance, the Contract shall be modified in writing accordingly.



10 MAR -1 P1:46

STATE PROCUREMENT OFFICE  
NOTICE OF AND REQUEST FOR EXEMPTION  
FROM CHAPTER 103D, HRS

STATE PROCUREMENT OFFICE  
STATE OF HAWAII

1. TO: Chief Procurement Officer  
2. FROM: DLNR Division of Forestry and Wildlife

Department/Division/Agency

Pursuant to §103D-102(h)(4), HRS, and Chapter 3-120, HAR, the Department requests a procurement exemption to purchase the following:

3. Description of goods, services or construction:

Provide expert service for the State of Hawai'i in collaboration with the Hawai'i Endangered Bird Conservation Program Partnership. Services provided include operation of the Maui Bird Conservation Center, Olinda, Maui and the Keauhou Bird Conservation Center, Volcano, Big Island, all aspects of avicultural care and breeding of endangered and surrogate birds, operations and maintenance of captive facilities, veterinary care of captive birds, assistance with field collections and release of birds, working with cooperating agencies to intergrate the captive propagation program with other aspects of endangered bird management and recovery, public outreach, and contribution of no less than \$281,820 in cash or in-kind services over the two year contract to provide the match for the federal funds that contribute to this project.

4. Name of Vendor: Zoological Society of San Diego (ZSSD).

Address: P.O. Box 120551, San Diego, CA 92112

5. Price:

\$402,000 (FY11)

\$452,000 (FY12)

6.

Term of Contract:

From: on approval

To: 6/30/2012

7. Prior Exemption Ref. No.

07-009-J/09-036-C

8. Explanation describing how procurement by competitive means is either not practicable or not advantageous to the State:

See Attached Explanation on Page 3

9. Details of the process or procedures to be followed in selecting the vendor to ensure maximum fair and open competition as practicable:

N/A

10. A description of the agency's internal controls and approval requirements for the exempted procurement:

The Division of Forestry and Wildlife will oversee the project implementation to ensure it is in compliance with performance standards of the federal grant program, the 6-year and annual work plans, and the contract scope of work developed by the Division. The project requires weekly, monthly and annual performance reports. These reports and a project description are made available to the public via the Division's web page. Once the purchase of services is approved, the scope of work will be developed and incorporated into a contract, the contract will be submitted for approval by the Division of Forestry and Wildlife Administrator and the Chairperson of DLNR.

# **REQUEST FOR EXEMPTION FROM CHAPTER 103D, HRS (Cont.)**

12. A list of agency personnel, by position, who will be involved in the approval process and administration of the contract:		
Name	Position	Involvement in Process
BLNR		<input checked="" type="checkbox"/> Approval <input type="checkbox"/> Administration
Deputy Attorney General		<input checked="" type="checkbox"/> Approval <input type="checkbox"/> Administration
Laura H. Thielen	Chirperson, DLNR	<input checked="" type="checkbox"/> Approval <input type="checkbox"/> Administration
Paul J. Conry	DOFAW Administrator	<input checked="" type="checkbox"/> Approval <input checked="" type="checkbox"/> Administration
Scott Fretz	DOFAW Program Manager	<input type="checkbox"/> Approval <input checked="" type="checkbox"/> Administration
David Leonard	DOFAW Wildlife Biologist	<input type="checkbox"/> Approval <input checked="" type="checkbox"/> Administration

13. Direct inquiries to:	Department: DLNR/DOFAW Contact Name: Scott Fretz Phone Number: 587-4187 Fax Number: 587-0160
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Agency shall ensure adherence to applicable administrative and statutory requirements

14. *I certify that the information provided above is, to the best of my knowledge, true and correct.*

*PSC*

*JA*

*2/25/10*

Department Head

Date

15. Date Notice Posted <u>3-2-10</u>	
The Chief Procurement Officer is in the process of reviewing this request for exemption from Chapter 103D, HRS. Submit written objections to this notice to issue an exemption from Chapter 103D, HRS, within seven calendar days or as otherwise allowed from the above posted date to: <div style="margin-left: 200px;">           Chief Procurement Officer            State Procurement Office            P.O. Box 119            Honolulu, Hawaii 96810-0119         </div>	
Chief Procurement Officer's comments:   <div style="margin-left: 100px;">           This approval is for the solicitation process only, HRS section 103D-310(c) and HAR section 3-122-112, shall apply. Department is reminded that procurements \$2,500 or more are required to be posted on the Procurement Reporting System.         </div>	

16.



APPROVED



DISAPPROVED

*Adam S. Fujita*  
Chief Procurement Officer

*4/12/2010*  
Date

Attachment 1. (Continued from page 1)

**Explanation describing how procurement by competitive means is neither practicable nor advantageous to the State:**

The captive propagation program for which the Zoological Society of San Diego (ZSSD) currently provides goods and services is part of an interagency collaboration with the U.S. Fish and Wildlife Service (USFWS) and the State of Hawai'i. The Department of Land and Natural Resources (DLNR) and the USFWS share costs of the program, with DLNR funds originating from Section 6 of the Federal Endangered Species Act. The Zoological Society of San Diego operates two separate facilities (one on Maui and one on Hawai'i) as a single integrated program. Maintenance of separate facilities administered by one organization is a key component of the program's success because it provides the following advantages: 1) allows for the rapid exchange of birds between facilities, 2) reduces the mortality risk of individual birds and thereby the risk of losing a species by providing standardized protocols for complex avicultural procedures (e.g., incubation, neonatal care), 3) facilitates the cross-training of personnel, and 4) allows personnel to move between facilities and field sites (e.g., remote release sites) as necessary. Overall, the two facilities-one administration approach minimizes the program's cost while at the same time ensures that the State receives a high-quality product. This product is measured in terms of successful propagation and release of native Hawaiian birds and ultimately by the recovery of these endangered species. This approach also facilitates collaboration among the USFWS, DLNR, and ZSSD.

Prior to the establishment of this program, no institution or entity had demonstrated the ability to breed endangered Hawaiian passerines in captivity. The current operator continues to be the only such institution worldwide. Although this program was previously carried out under the supervision of The Peregrine Fund, no change in management or operations occurred at the time of transfer to ZSSD. The Zoological Society of San Diego staff has acquired years of experience and has established a 10-year record of successful operations of this program. Procurement by competitive means would be neither advantageous to the State nor practicable. No other vendor has similar expertise and experience to ZSSD in breeding and caring for endangered Hawaiian forest birds. Thus a change in vendors would increase the risk of failure, the potential loss of critically endangered species, and program setbacks; all of which could result in a loss of public support and funding for the program. Currently, the USFWS has a cooperative agreement with ZSSD through which they provide money to ZSSD. These funds are in addition to those provided to the State (i.e., Section 6 funds; see above) which are passed through to ZSSD.

To be successful the program requires unique expertise which can only be obtained through years of experience. Shifting to a new vendor would introduce an element of risk, which if accompanied by average or poor performance, would result in poor production in the captive propagation program. This could result in the injury or death of irreplaceable and Federally protected captive endangered birds. This risk is especially acute for the 'Alalā, or Hawaiian Crow, which is critically endangered. Because no 'Alalā exist in the wild, the species is entirely dependent on the captive breeding program to prevent their extinction.



, The current operator has a nationally recognized and award-winning program that is currently caring for and breeding the world's remaining 'Alalā, and housing four other endangered Hawaiian forest birds. The operator is currently maintaining: 56 'Alalā, 27 Puaiohi, 25 Palila, 12 Maui Parrotbill, and 1 Ākepa. All of the birds are listed as endangered by the USFWS and the State of Hawai'i. A mishap in the care and breeding of these endangered birds during a transition of operations would be unfortunate and potentially have legal ramifications. Thus, it is to the State's advantage to maintain ZSSD as the operator of its captive breeding program.

